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Supreme Court of the United States

October Term, 1973

No. 73-556

FLORIDA POWER & LIGHT COMPANY, *Petitioner*,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 641, ET AL, *Respondents*.

No. 73-795

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO, ET AL, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae*, in support of the position of the the union-respondents, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international labor unions having a total membership of approximately

13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

1. In the instant cases the National Labor Relations Board seeks this Court's approval for the agency's view that it is an unfair labor practice proscribed by § 8(b)(1)(B) for a union to discipline a supervisor who is its member for performing bargaining unit work during a strike. The asserted statutory source of this prohibition provides that it is an unfair labor practice for a union or its agent "to restrain or coerce,"

"an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; * * *"

This language does not readily lend itself to the Board's interpretation. Nor do the authoritative Congressional explanations: e.g., under § 8(b)(1)(B)

"a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances." (S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 21; 1 Legislative History of the Labor Management Relations Act, 1947, p. 427, hereafter cited as "Leg. Hist.")

To circumvent these impediments in its path, the Board

first argues that the result it reached in this case is justified by the "evolution of the Board's interpretation of § 8(b)(1)(B)" (Bd. Br. p. 18, caps omitted), relying on a line of cases begun in 1968 (over 20 years after the enactment of that Section). (See Bd. Br. pp. 18-27.) But as the Chief Justice has recently reminded, while the circumstance that a holding is at the end of "a chain of evolutionary developments * * * [and] appear[s] a reasonable step in relation to that which preceded it" is sufficient to lend it "seductive plausibility," it is *insufficient* to warrant its approval "where the aggregate or end result is one that would never have been seriously considered in the first instance." (*United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 127.) Therefore it is not necessary to determine at which point the Board made its first misstep; it suffices to show that the Board's holding in the present cases does not accord with the overall scheme of the Act, § 8(b)(1)(B)'s language, or the legislative history which further informs our understanding of the Congressional intent.

2. The error of the Board's view of the scope of § 8(b)(1)(B) appears most clearly when it is contrasted with the narrow role envisaged by Congress for that provision. Both the statutory language and the amplification on that language in the Senate Report (just set out at p. 2), as well as the floor statements by Senators Taft and Ellender that constitute the remainder of the record,¹ evince a determination that to further perfect the process of collective bargaining delineated in § 8(d), and the process of grievance

¹ See 93 Cong. Rec. 3838; 2 Leg. Hist. p. 1012, and 93 Cong. Rec. 4143; 2 Leg. Hist. p. 1077.

dispute settlement approved in §§ 203 & 204, (these three provisions were also added to the Act in 1947), it is necessary to assure that management is free to choose its spokesmen without being subject either to union refusals to meet or to strike action. Indeed, the Senate Report makes it plain that the major purpose of § 8(b)(1)(B) is to protect employers from being "coerce[d] into joining or resigning from an employer association." In this respect, the Section represents a more restrained approach to the problem of multi-employer bargaining than that which had been proposed by the House. Section 9(f)(1) of H.R. 3020 would have outlawed multi-employer bargaining;² but the Senate, and eventually Congress, provided that employers and unions should retain the privilege to engage in such bargaining by voluntary mutual agreement.³ The secondary function of § 8(b)(1)(B), and the one with which we are here concerned, furthers the overall purpose just described by "also" prohibiting union "dictat[ion of] who shall represent an employer," (S. Rep. No. 105, 80th Cong., 1st Sess., p. 21; 1 Leg. Hist., p. 427).

But there is not a word in § 8(b)(1)(B) or its history that even suggests a Congressional intent to empower the Board to go beyond regulation of the bargaining process and to enter the entirely distinct and highly sensitive area of the use of economic weapons during a lawful strike. (Compare

² See House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 8-9, 56; 1 Leg. Hist. pp. 299-300, 347.

³ Compare §§ 2(3), 2(11) & 14(a) discussed at pp. 5-7 *infra*, in which, as we demonstrate, Congress chose to reinstate the employer's privilege to discharge supervisors for union membership or union activity rather than enacting new federal prohibitions.

Labor Board v. Insurance Agents, 361 U.S. 477 and *Labor Board v. Driver' Local Union*, 362 U.S. 274, discussed at pp. 14-18 *infra*.) And of course, disciplining a supervisor-member who performs rank-and-file work during a strike is the union's counterpoise to the employer's use of his supervisors to break the strike. Nor is there a word in § 8(b) (1)(B) or its history suggesting that Congress, despite its determination to continue to allow unions to exercise their historic right to discipline rank-and-file members who work during a strike, intended to prohibit such discipline of supervisor-members. (Compare *NLRB v. Allis-Chalmers*, 388 U.S. 175 and *NLRB v. Boeing Co.*, 412 U.S. 67 discussed at pp. 9-10 *infra*.)

3. The Board purports to provide a statutory justification for its conclusion here by arguing that in 1947 "Congress' dominant objective [was to] insure the employer the undivided loyalty of his supervisors," and that the Board's reading of § 8(b)(1)(B) "effectuates [that] objective," (Bd. Br. p. 31). But, as we now show, while recognition was given in 1947 to the employer interest in a supervisory force which owes undivided loyalty to the employer, that end was advanced, not by creating an unfair labor practice in § 8(b) (1)(B), but by providing the employer a privilege to discharge supervisors because of their union membership or union activity. This was accomplished by amending the definition of "employee" in § 2(3) to exclude those denominated 'supervisors' in § 2(11), and by providing in § 14(a) that while "nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization," no employer "shall be compelled to deem individuals defined herein as supervisors

as employees for the purpose of any law, either national or local, relating to collective bargaining."

Thus, Congress protected employers by reserving in them the privilege to discharge, or not to hire, supervisors who are union members, and to refuse to bargain about supervisors' wages, hours and working conditions. But Congress did not afford employers the added protection of making it an unfair labor practice, enforceable by Board sanctions, for supervisors to be union members (see *Labor Board v. News Syndicate*, 365 U.S. 695, 699), or for unions to exercise their traditional authority over their members, by disciplining supervisor-members (like rank-and-file members) for strikebreaking.

(a). In *Packard Motor Co. v. Labor Board*, 330 U.S. 485 (1947), this Court, agreeing with the Board, answered in the affirmative the question, "whether foremen are entitled as a class to the rights of self-organization, collective bargaining, and other concerted activities as assured to employees generally by the National Labor Relations [Wagner] Act," (*id.* at 487).

The 1947 Congress regarded that "recent development * * * [*viz.*] the successful efforts of labor organizations to invoke the Wagner Act for covering supervisory personnel," as one which would "deprive * * * management * * * of the undivided loyalty of its foremen * * * unless this Congress takes action." (S. Rep. No. 105, 80th Cong., 1st Sess., pp. 3, 5; 1 Leg. Hist., pp. 409, 411.) The "action" recommended by the Senate Labor Committee, and by the House Labor Committee as well, and adopted by Congress, was directly responsive to the *Packard Motor Co.* decision:

as already noted the term "employee" in § 2(3) was redefined to exclude "supervisors," a class which was delineated in a new § 2(11); additionally, Congress adopted § 14(a) which established that neither the NLRB nor any state agency could afford supervisors the status of "employees." On the other hand, Congress did not make it unlawful for supervisors to join unions or for employers to accept their doing so; indeed, § 14(a) provides also that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization." In sum, Congress "relieve[d] employers * * * free of any compulsion by this national Board or any local agency to accord to the front line of management the anomalous status of employees" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 5; 1 Leg. Hist., p. 411), and thereby reinstated the employer's previously recognized privilege "to discharge * * * foremen for union activity," (93 Cong. Rec. 3836; 2 Leg. Hist., p. 1008; remarks of Sen. Taft).

In its memorandum *amicus curiae* in *Beasley v. Food Fair* (No. 72-1597, this Term), the Board accurately summarizes the scope and rationale of §§ 2(3), 2(11) and 14(a):

"These amendments were designed to provide a solution to the conflict-of-loyalty problem created by the unionization of supervisors. Supervisors were free to join unions and to bargain through them if the employer was willing; on the other hand, the employer could insist that his supervisors not join unions and discharge them if they did." (Bd. Mem. in No. 72-1597, p. 6.)⁴

⁴ It is particularly instructive to compare the Board's *Beasley* memorandum (at pp. 5-12), where § 14(a) is regarded to be of

The discussions of §§ 2(3), 2(11) & 14(a) are the only ones which advert to a Congressional desire "to insure the employer the undivided loyalty of his supervisors," (Bd. Br. p. 31). And there is nothing in those discussions to support the Board's view that Congress' "solution" to this "conflict of loyalty problem" (Bd. Mem. in No. 72-1597, p. 6), encompassed the creation of an unfair labor practice prohibiting union discipline of supervisor-members for strike-breaking.

(b). As this Court observed in *NLRB v. Allis-Chalmers*, 388 U.S. at 181-182, the 1947 Congress was well aware that "[p]rovisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, . . . were commonplace at the time of the Taft-Hartley amendments." Moreover, in explaining why supervisors were being deprived of the status of employees the House Report observed that leading foremen's union, the Foremen's Association of America, had, in order to obtain the support of the rank-and-file for strikes by its foremen-members, "adopted a formal 'policy' forbidding *its* members, when the rank-and-file unions strike, to enter the struck plants and protect and maintain them without the consent of the rank-and-file unions." (H. Rep. No. 245, 80th Cong., 1st Sess., pp. 15-16; 1 Leg. Hist., pp. 306-307, emphasis in original.) It was thus understood that union membership of supervisors diminishes the employer's ability to use supervisors as strikebreakers.

controlling importance, with its brief in this case (at pp. 31-32), where it attempts to deprive that section of all significance. Indeed, the understanding of § 14(a) expressed by the court below, which the Board seeks to rebut at this point in its brief, accords with the Board's own reasoning in *Beasley*.

But Congress was not willing to press the principle of "insuring the employer the undivided loyalty of his supervisors" (Bd. Br. p. 31), to the extent of enacting a prohibition against supervisors' union membership or of limiting the right of unions to discipline their supervisor-members for strikebreaking.

The first of these solutions would have further sharpened the division between the proponents of legislation to reverse the *Packard Motor Co.* decision and those who desired to safeguard the right of supervisors to join and form unions. One of the grounds for the veto of the Case bill, the predecessor of the 1947 amendments to the Wagner Act, had been the 1946 Congress' restrictions on supervisors' union membership.⁵ So, too, in 1947, the minority in both the House and Senate Labor Committees attacked §§ 2(3), 2(11) & 14(a) for withdrawing from supervisors the right even to form and join their own (if not rank-and-file) unions.⁶

The second alternative, and the one advocated by the Board herein, would have conflicted with the desires of both the majority and the minority to minimize interference with the internal affairs of unions, see the discussion in *Allis-Chalmers, supra*, 388 U.S. at 184-195, from which this Court concluded:

"What legislative materials there are dealing with § 8(b)(1)(A) contain not a single word referring to the

⁵ H.R. 4908, 79th Cong., 2nd Sess. President Truman's veto message is set out at 92 Cong. Rec. 6674; the issue of supervisors' union membership is discussed *id.* at 6677.

⁶ H. Min. Rep. No. 245 80th Cong., 1st Sess., pp. 71-72; 1 Leg. Hist., pp. 362-363; S. Min. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess., pp. 39-40; 1 Leg. Hist. pp. 501-502.

application of its prohibitions to traditional internal union discipline in general, or disciplinary fines in particular. On the contrary there are a number of assurances by its sponsors that *the section was not meant to regulate the internal affairs of unions.*" (388 U.S. at 185-186 quoted with approval and followed in *NLRB v. Boeing Co.* 412 U.S. at 73; emphasis in the latter.)⁷

Thus, in the context of "a predictable Presidential veto" (cf. *Pipefitters v. United States*, 407 U.S. 385, 409), a more radical proposal than changing the statutory status of supervisors, such as creating a federal prohibition either against supervisors' union membership, or against union discipline of supervisor-members for strikebreaking, would have endangered the delicate political balance required by the anticipated need to secure a two-thirds majority in both houses if the bill were to become law. The sponsors of the 1947 amendments were therefore content to restore the relationship between employers and supervisors to that

⁷ In *NLRB v. Marine and Shipbuilding Workers*, 391 U.S. 418, 424, the Court stated that "§ 8(b)(1)(A) assured a union freedom of self-regulation where its legitimate internal affairs are concerned. But where a union rule penalizes a member for filing an unfair labor practice charge with the Board, other considerations of public policy come into play." As the sole example of union discipline to further "its legitimate internal affairs," Mr. Justice Douglas cited *Allis-Chalmers*, which he described as having held "that § 8(b)(1)(A) does not prevent a union from imposing fines on members who cross a picket line created to implement an authorized strike." (*Id.*) Thus, there can be no doubt that *Marine Workers* was not intended to sanction Board regulation of union discipline of members for strikebreaking on the theory that such discipline like expulsion for filing a charge does not concern "its legitimate internal affairs." The Board's reliance on *Marine Workers* (Bd. Br. pp. 45-46), in this case is therefore entirely misplaced.

which had obtained before the Wagner Act; they did not choose to take the additional risk entailed in giving affirmative protection to the employers against conflicting supervisory loyalties.

Further evidence that § 8(b)(1)(B), in particular, was not intended to deal with the controversial "conflict-of-loyalty" issue, is that this Section is unique among the Senate bill's proposed union unfair labor practices in achieving the approval of the minority both as to the end sought and the means utilized to secure that end.⁸ This was undoubtedly due to its carefully delineated language, whose narrow meaning was confirmed by the Senate Report. The understanding at the time is highlighted by Senator Taft's floor explanation of § 8(b)(1)(B) which tracked the Section's language and was introduced by his statement that "[t]his unfair labor practice referred to is not perhaps of tremendous importance * * *," (93 Cong. Rec. 3954; 2 Leg. Hist., p. 1912).⁹ Cf. *Pipefitters v. United States*, 407 U.S. at

⁸ See S. Min. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess., pp. 40-41; 1 Leg. Hist., pp. 502-503, describing this provision as one of the "Acceptable Provisions of the [Senate] bill."

⁹ Senator Taft stated:

"This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'we do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you will have to fire him, or we will not go to work.' This is the only section in the bill which has any relation to Nation-wide bargaining. Under this provision it would be impossible for a union to say to a company, 'we will not bargain with you unless you appoint your national employers' association as your

409, where this Court said that Senator Taft's "view of the limited reach of" a different provision, "entitled in any event to great weight, is in this instance controlling."¹⁰

The Board's conception of § 8(b)(1)(B) attributes to Senator Taft, and his colleagues who were responsible for drafting and explicating the Senate bill a cynical disingenuousness never attributed to them even by their open opposition. For, its operative premise is that while the proponents stated that they had focussed on and met the problem of conflicting supervisory loyalty in §§ 2(3), 2(11) & 14(a), and never adverted to that problem in connection with § 8(b)(1)(B), their true purpose in the latter provision was to go beyond the employer privilege they had reinstated by the acknowledged reversal of the *Packard Motor Co.* decision.

If Senator Taft is credited, what he would not say during the debates is also pregnant with significance. His explanation of §§ 2(3), 2(11) & 14(a) made it plain that the Senate bill did not retain any statutory protections for supervisors. The removal of all such protections was the means,

agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purposes."

¹⁰ For Senator Taft's limiting construction: of § 8(b)(1)(A), see *Drivers' Local Union*, *supra*, 362 U.S. at 287-288 and *Allis-Chalmers*, *supra*, 388 U.S. at 185-190; of the damage remedy provided by § 303, see *Teamsters Union v. Morton*, 377 U.S. 252, 260 n. 16; of the reach of § 8(b)(6), see *ANPA v. Labor Board*, 345 U.S. 100, 106-111; and of the regulation of union political activity by 18 USC § 610, see *Pipefitters* cited in the text.

as we have seen, by which employers were to be assured the "undivided loyalty" of their supervisors. It is, therefore, utterly anomalous for the Board to argue in support of a construction of § 8(b)(1)(B) which would give employers a greater protection than Congress contemplated, that this construction would also protect the interests of supervisors, (Bd. Br. pp. 41-42).

(c). The short of the matter is that the elaborate policy arguments advanced by the Board in its decisions herein and in its arguments to this Court do not "reconstitute the gamut of values at the time that the [statutory] words were uttered";¹¹ they rebel against them. Very much in point, therefore, is Mr. Justice Harlan's criticism in *Machinists v. Labor Board*, 362 U.S. 411, 428, of an earlier Board's refusal to hew to the lines Congress drew:

"We think this analysis inadmissible for the reason that the accommodation between these competing factors has already been made by Congress. It is a commonplace, but one too easily lost sight of, that labor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The 'policy of the Act' is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it. Cf. Note 7 [362 U.S. at 425]."

Here it "may be asserted, without fear of contradiction, that the interest in [undivided loyalty of supervisors to employers] is one of those given large recognition by the

¹¹ *Woodwork Mfrs. Assoc. v. NLRB*, 386 U.S. 612, 620 (quoting L. Hand, J.).

Act as amended." (*Id.*) But here, too, it is impermissible to disregard the "competing interests." (*Id.*) The Board's decisions in these cases disrespect the "totality of [the] adjustment" which Congress made; they provide to this particular employer interest an implementing force—the Board's unfair labor practice sanctions—with which it was not endowed by Congress, and protect perceived interests of supervisors which Congress, rightly or wrongly, did not recognize. Once again, "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy * * *," (*Machinists, supra*, 362 U.S. at 429.)

4. We have seen thus far that § 8(b)(1)(B) was enacted to safeguard the right of employers to bargain and settle grievances through representatives of their own choosing and that the Board has wrenched that provision out of context in order to grant an additional protection (not provided by Congress) to the employer who wishes to meet a strike by having his supervisors do rank-and-file work, and to deprive the union of a countervailing economic weapon—discipline of its supervisor-members—otherwise available. This is not the first time the Board has misused one of the "five specific practices by labor organizations" that Congress determined "should be defined as unfair labor practices" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 8, 1 Leg. Hist., p. 414), in order to implement the agency's own views as to the validity of certain economic weapons.

In *Insurance Agents, supra*, 361 U.S. 477, the question presented was whether the Board, as it claimed, was:

"authorized under the Act to hold that * * * certain planned concerted on-the-job activities designed to

harass the company * * * which the Act does not specifically forbid but Sec. 7 does not protect, support a finding of a failure to bargain in good faith as required by Sec. 8(b)(3).” (*Id.* at 480, 482-483; footnotes omitted.)

This Court held that the Board had no such authority. In so doing, Mr. Justice Brennan emphasized:

“[I]f the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties’ own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations. See S. Rep. No. 105, 80th Cong., 1st Sess., p. 2. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.” (*Id.* at 490.)

That being so the Court disagreed with the Board as to the extent to which the agency was free to adjudge union activity not affirmatively protected by the Act to be an unfair labor practice:

“The Board suggests that since * * * the union members’ activities here were unprotected, and they could have been discharged, the activities should also be deemed unfair labor practices, since thus the remedy of a cease-and-desist order, milder than mass discharges of personnel and less disruptive of commerce, would be available. The argument is not persuasive. There is little logic in assuming that because Congress

was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use, it also impliedly declared these tactics unlawful as a matter of federal law. Our problem remains that of construing § 8(b)(3)'s terms, and we do not see how the availability of self-help to the employer has anything to do with the matter." (*Id.* at 495.)

Yet, in the instant cases the Board seeks to supplant the use of "self-help . . . [which] Congress was willing to allow employers" by reversing the *Packard Motor Co.* decision, through the device of making it an unfair labor practice for a union to discipline supervisor-members for strikebreaking.

Insurance Agents is additionally instructive in that the Court there stated the limits of the deference due to the Board's expertise:

"Where Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked. We see no indication here that Congress has put it to the Board to define through its processes what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining." (*Id.* at 499-500.)

The analysis developed thus far demonstrates that here as in that case the Board has sought to answer a question that Congress has not asked of it.

The Board's misinterpretation of § 8(b)(1)(B) is also parallel to the unwarranted expansion of § 8(b)(1)(A) checked in *Drivers' Local Union, supra*, 362 U.S. 274. There the Board had held that

“peaceful picketing by a union, which does not represent a majority of the employees, to compel immediate recognition as the employees’ exclusive bargaining agent, is conduct of the union ‘to restrain or coerce’ the employees in the exercise of rights guaranteed in § 7, and thus an unfair labor practice under § 8(b)(1)(A).” (*Id.* at 275.)

This Court reversed. Mr. Justice Brennan, again writing for the Court, noted that the Board’s lack of authority to regulate economic weapons without a particularized statutory mandate as stated in *Insurance Agents* embodied the central lesson of § 13, which:

“declares a rule of construction which cautions against an expansion reading of [one of the unfair labor practice provisions] which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute.” (*Id.* at 282.)

And, he returned to a point also central to the *Insurance Agents*’ decision:

“The Board asserts that the very general standard in § 8(b)(1)(A) vests power in the Board to sit in judgment upon, and to condemn, a minority union’s resort to a specific economic weapon, here peaceful picketing. The structure of § 8(b), which defines unfair labor practices, hardly supports the Board’s claims. Earlier this Term we pointed out that ‘Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions.’” (*Id.* at 282-283.)

Here, the expansion of the second subdivision of § 8(b)(1) attempted by the Board does equal violence to a limited

prohibition enacted by Congress. And, again, the extension essayed by the Board has the effect of restricting the right to strike and to utilize kindred peaceful economic weapons guaranteed by § 13.¹²

5. The Board's decisions in the first twenty years after the adoption of the Taft-Hartley amendments confirmed Senator Taft's evaluation that § 8(b)(1)(B) "is not perhaps of tremendous importance." In 1960 the Board was able to advise the Second Circuit that only 11 cases under § 8(b)(1)(B) had thus far arisen.¹³ This paucity of cases was due to the Board's confining that provision to its intended reach; it can not have been because unions did not discipline their supervisor-members or because employers did not utilize supervisors to perform rank-and-file work during strikes.

The furthest that the Board would go in those days was to assert that a union violates § 8(b)(1)(B) by striking for a clause which would require foremen who handle grievances to be members of the union; the Board's position ultimately prevailed in this Court by a 4-4 affirmance of the First Circuit. *Typographical Union v. Labor Board*, 365 U.S. 705, affirming by an equally divided court, 278 F.2d 6, 11-13 (C.A. 1). In the support of that position the Board took

¹² In both *Insurance Agents and Drivers' Local Union*, the Board's freewheeling regulation of economic weapons resulted in an advantage for employers. That, however, has not always been the case. See e.g., *American Shipbuilding Co. v. Labor Board*, 380 U.S. 399; *Labor Board v. Brown*, 380 U.S. 278.

¹³ Brief for the NLRB in *NLRB v. Local 294 Teamsters* (C.A. 2 No. 26,224) p. 16. (The Court of Appeals decision is reported at 284 F.2d 893.) Of these, 5 concerned multi-employer bargaining.

pains to bring its view within the statutory language and the purpose stated in the Senate report: the Board contended that a requirement of union membership for foremen would prevent employers from selecting those individuals who were not, or did not wish to remain, union members.¹⁴ Yet, under the agency's present conception of § 8(b)(1)(B) the *Typographical Union* case would have been a simple one.

It was not until 1968, when the Board took what is admittedly a broader view of § 8(b)(1)(B), that litigation under this Section began to burgeon and this hitherto unimportant unfair labor practice came to assume substantial dimensions. We have stated at the outset that it is not our task to demonstrate that *San Francisco-Oakland Mailers*, 172 NLRB 2173 (hereafter "*Oakland Mailers*"), or any of its progeny, before the present cases, reached the wrong result. But it does bear emphasis in light of the importance the Board attaches to the "evolutionary process" by which the decisions herein were reached (Bd. Br. p. 18), that this evolution commenced not when the Act was born, but when it had almost reached voting age. Moreover, the "specialized experience" (Bd. Br. p. 39), which avowedly underlies the present decision is not industrial experience, either in the years before *Oakland Mailers* or in the relatively short period thereafter; it is not even "experience" in the form of a new insight into the original understanding of § 8(b)(1)(B) resulting from collateral developments in the law, (cf. *Boys Market v. Retail Clerks*, 398 U.S. 235). The only "experience" that has been

¹⁴ Brief for the NLRB in No. 340, Oct. Term 1960, p. 39.

brought to bear by the Board in these cases is in the manipulation of the concepts and policies introduced into § 8(b)(1)(B) in *Oakland Mailers*. How little that is worth appears from the inability of the Board to reconcile the view it took of the *Allis-Chalmers* case in *Oakland Mailers* with its decisions herein, as well as from the other inconsistencies between these decisions and their predecessors, as set forth in the majority opinion below and in the brief for the union-respondents, (see pp. 28-45, 49-55 of that brief).

Surely, then, the Board's construction of § 8(b)(1)(B) in the present cases derives no support from its origins in recent administrative history. On the contrary, if in a case where the direct evidence of legislative intent points uniformly to a single result the more indirect evidence of administrative interpretation is to be given any weight, it is the narrower interpretation which prevailed in the first twenty years which merits consideration. "Not lightly vacated is the verdict of quiescent years."¹⁵

¹⁵ *Coler v. Corn Exchange Bank*, 250 N.Y. 136, 141; 164 N.E. 882, 884 (Cardozo, J.).

CONCLUSION

For the foregoing reasons as well as those stated by the union-respondents, the decision below should be affirmed.

Respectfully submitted,

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